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APPENDIX A

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LEGAL MEMORANDUM SUPPORTING COMMENTS OF KENNECOTT ON THE MINING WASTE EXCLUSION
(50 Fed. Reg. 40292, October 5, 1985)

INTRODUCTION AND SUMMARY

EPA has proposed to reinterpret the Bevill Amendment because the current interpretation "does not reflect either the special waste concept or the intent of Congress" (50 Fed. Reg. 40294). This conclusion is based on an unwarranted departure from the plain meaning of the statute. The language of the Bevill Amendment and the study provision in Section 8002(p) leave no doubt that all primary smelting and refining wastes are to be studied and are not to be regulated under RCRA until the study is complete. This unmistakable purpose cannot be overridden by selective quotation from legislative history that is at best inconclusive and at least equally supportive of the plain meaning of the statute. This is particularly true in this case, where: (1) EPA's interpretation would produce regulatory consequences directly at odds with congressional waste management policies; and (2) EPA bears the heavy burden of justifying reversal of a longstanding interpretation completely in accord with the plain meaning. These points are presented in detail below.

I. EPA'S PROPOSAL IS BASED ON AN UNWARRANTED DEPARTURE FROM THE PLAIN MEANING OF THE ACT.

A. The Bevill Amendment Plainly Includes All Smelting and Refining Waste.

1. The Bevill Amendment. The Bevill Amendment applies to "solid waste from the extraction, beneficiation and processing of ores and minerals" (42 USC § 6921(b)(3)(A)(ii), emphasis supplied). As demonstrated in Kennecott's Comments (pp. 3-5), there is no doubt that "processing" is the mining industry's general term for smelting and refining. Former Rep. Santini, a major supporter of the Bevill Amendment, submitted testimony at the hearing that this was the general understanding in Congress when the amendment was passed in 1980, and that is why the term "processing" was used. Rep. Bevill, the sponsor of the amendment, has submitted testimony to the same effect. 1/ The Federal courts have also recognized that in the mining industry, "processing" means smelting and refining. 2/

Technical terms used in a statute are presumed to have their technical meaning. 3/ Further, statutes must be

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1/ See Statement of Jim Santini, pp. 1-2 (November 14, 1985); Statement of the Honorable Tom Bevill, p. 1 (November 14, 1985). While post-passage remarks by legislators generally cannot serve to change legislative intent expressed at the time of passage, there is no reason to dismiss testimony which is uniformly supported by the contemporaneous legislative history. See Ambook Enterprises v. Time, Inc., 612 F.2d 604, 610 (2d Cir. 1979). In any event, Mr. Santini's testimony is a conclusive correction of EPA's misconception of his position in 1980.

2/ See Usery v. Kennecott Copper Corp., 577 F.2d 1113, 1115 (10th Cir. 1977).

3/ See Corning Glass Works v. Brennan, 417 U.S. 188, 201-02 (1974); United States v. Cuomo, 525 F.2d 1285, 1291 (5th Cir. 1976).

construed to give effect to each word. 1/ EPA's proposal to exclude most smelting and refining waste from the Bevill Amendment effectively reads "processing" out of the statute and therefore violates these cardinal rules of statutory construction.

EPA's proposed reinterpretation also ignores the fact that when Congress wanted to exclude particular wastes from the Bevill Amendment, it did so expressly. The uranium exclusion is limited to overburden from uranium mines, and Rep. Bevill testified that this specific limitation on the statute's coverage is the only one that Congress intended (Bevill Statement, p. 1). The uranium exclusion is a clear indication that the Bevill Amendment applies to all wastes not specifically excluded. 2/

Yet another problem with EPA's proposal is that it runs afoul of the rule that statutes must be construed to avoid unreasonable results. 3/ As demonstrated in Kennecott's Comments (pp. 7-8), the proposal would produce the unreasonable result of subjecting integrated mining and processing facilities to conflicting regulatory requirements.

Finally, EPA's proposal reverses the agency's contemporaneous construction of the Bevill Amendment. The original construction is entitled to great weight, particularly where, as here: (1) it represents the agency's interpretation shortly after the law was enacted, (2) the industry has relied on it, and (3) Congress was aware of it but did not change it in subsequent amendments to the Act. 4/

1/ See United States v. Menasche, 348 U.S. 258 (1955); Unification Church v. INS, 762 F.2d 1077, 1085 (D.C. Cir. 1985).

2/ See American Methyl Corp v. EPA, 749 F.2d 826, 835-36 (D.C. Cir. 1984) (and cases cited therein).

3/ See American Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982); James v. United States, 760 F.2d 590, 603 (5th Cir. 1985).

4/ See Chemehuevi Tribe v. FPC, 420 U.S. 395, 409-10 (1975); Texaco, Inc. v. DOE, 663 F.2d 158, 165 (D.C. Cir. 1980); United States v. Pennsylvania Industrial Chemical Corp., 461 F.2d 468, 477 (3d Cir. 1972).

2. Other Sections of the Act. In construing the Bevill Amendment, EPA must look not only to the amendment itself but to the Act as a whole. 1/ Other provisions of RCRA confirm that the Bevill Amendment was intended to cover all wastes from primary smelting and refining facilities.

Foremost among these provisions is Section 8002(p), which requires EPA to perform a "detailed and comprehensive" study of Bevill wastes, including any "documented cases in which danger to human health or the environment has been proved" (42 USC § 6982(p)). Clearly, this language envisions a detailed study of all smelting and refining wastes, not just smelter slag.

Moreover, the study must be performed "in conjunction with" the mine waste study required by Section 8002(f). As Mr. Santini testified, the mine waste provision, adopted in 1976, already required a study of mining and milling wastes before the Bevill Amendment and Section 8002(p) were added in 1980. 2/ Section 8002(p) was added to make sure that smelting and refining wastes would also be studied. EPA's proposal would defeat this intent and effectively render Section 8002(p) a nullity, in violation of the rule against such constructions. 3/

EPA's proposal also runs counter to Section 3004(x) and the other amendments to Section 3004 adopted in 1984 (42 USC § 6924). Those amendments eventually prohibit most land disposal of hazardous wastes, but also recognize the unique technological and economic problems confronting mining and mineral processing facilities. Accordingly, EPA is authorized to establish a separate regulatory regime for such facilities after completing the studies required by Section 8002.

1/ See United States v. Morton, 81 L. Ed. 2d 680, 688 (1984) (and cases cited therein).

2/ Santini Statement, p. 2.

3/ See page 3, note 1, supra.

If EPA's proposal is finalized, most smelting and refining wastes will be removed from the purview of Section 3004(x). As a result, such wastes will be subject to the current requirements of Subtitle C and, eventually, to the prohibition on land disposal, even though EPA has yet to suggest any possible method of compliance with these requirements by mineral processing facilities. As noted in Kennecott's Comments (pp. 7-8), these problems are particularly acute at integrated facilities, which would also face recycling restrictions contrary to the Act's stated purpose of encouraging conservation and recovery of useful materials contained in waste (see 42 USC §§ 6901(c), 6902(a)(6)).

In enacting Sections 8002(p) and 3004(x), Congress clearly intended for EPA to avoid such problems by establishing a tailored regulatory program after thorough study of mining and mineral processing industries. EPA's proposal can only serve to frustrate this intent.

B. Inconclusive Legislative History Cannot Serve to Vitiate the Plain Meaning of the Act.

As demonstrated above, in construing the Bevill Amendment EPA need look no further than the plain language of the Act. Resort to legislative history is therefore unnecessary. 1/ Even more importantly, legislative history can never be used to qualify a statute where, as here, such history is vague and at least equally supportive of the plain meaning. 2/

The crux of the legal position behind EPA's proposal is that "the legislative history of the Bevill Amendment indicates that EPA's regulatory concept of a 'special waste' should be used as a guide in discerning Congressional intent" (50 Fed. Reg. 40293). However, one searches the relevant legislative history in vain for any statement clearly indicating that the Bevill Amendment is limited to

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1/ See TVA v. Hill, 437 U.S. 153, 184 n.29 (1978); Ex Parte Collett, 337 U.S. 55, 61 (1949).

2/ See NLRB v. Plasterers Local Union, 404 U.S. 116, 129 n.24 (1971); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 412 n.29 (1971); see also United States v. U.S. Steel Corp., 482 F.2d 439, 444 (7th Cir.), cert. denied, 414 U.S. 909 (1973).

wastes covered by EPA's 1978 proposal to establish a "special waste" category. Although EPA quotes Rep. Santini in support of its proposal, he has testified that his reference to special waste was merely a shorthand description of the amendment and was not intended to limit its scope in any way (Santini Statement, p. 2). The only other pertinent reference cited by EPA is the 1980 Conference Report, but here again there is no clear statement that the Bevill Amendment is limited to "special waste" as EPA used the term in 1978. The report states only that all special waste should be covered. 1/ This ambiguity is not remedied by reference to EPA's 1978 proposal, which nowhere clearly excludes the wastes that EPA would exclude in this proceeding. 2/ Hence, even if Congress had intended to limit the Bevill Amendment to the 1978 special wastes, it is doubtful that this would have been understood to exclude all smelting and refining wastes except slag, as EPA now proposes.

Against these inconclusive references are a number of clear indications that the Bevill Amendment was intended to cover all primary smelter and refinery waste, in accordance with the plain meaning of the statutory language. As EPA has noted, during the 1980 debates Rep. Williams indicated that smelter waste should be covered (50 Fed. Reg. 40293). Rep. Bevill stated that his amendment should "be read broadly to incorporate the waste products generated in the real world" (id.). Rep. Bevill has confirmed this intent in this proceeding (Bevill Statement, p. 1). In discussing the study provision in Section 8002(p), the conference report mentions no limitation to special wastes. 3/

1/ See S. Rep. No. 1010, 96th Cong., 2d Sess. 32 (1980). The 1984 legislative history cited by EPA is irrelevant. As Rep. Bevill testified, the 1984 Amendments did not change the scope of the Bevill Amendment. Bevill Statement, p. 2; see H.R. Rep. No. 1133, 98th Cong., 2d Sess. 94 (1984) (Conference Report). Further, the general rule is that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." CPSC v. GTE Sylvania, Inc., 447 U.S. 102, 117-18 (1980).

2/ See 43 Fed. Reg. 58946 (December 18, 1978).

3/ See H.R. Rep. No. 1444, 96th Cong., 2d Sess. 45 (1980).

Moreover, RCRA and its legislative history evince a number of clear congressional waste management policies. Kennecott believes that EPA's reinterpretation proposal is directly at odds with several of these policies, for reasons to which we now turn.

II. EPA'S PROPOSAL DIRECTLY CONTRAVENES CONGRESSIONAL WASTE MANAGEMENT POLICIES.

As demonstrated in Kennecott's Comments above (pp. 7-8), EPA's proposal would discourage Kennecott's plans to manage smelter and refinery wastes by treating them with lime and mixing them with tailings. Yet the legislative history of the Bevill Amendment indicates that it was intended to encourage just such solutions to waste management problems. During the 1980 House debate, Rep. Bevill made it clear that his amendment should be construed to cover not only the specifically enumerated wastes but also other wastes with which they may be mixed:

> "EPA should recognize that these 'waste streams' often include not only the by-products of the combustion of coal and other fossil fuels, but also relatively small proportions of other materials produced in conjunction with the combustion, even if not derived directly from the fuels. EPA should not regulate these waste streams because of the presence of these materials if there is no evidence of any substantial environmental danger from these mixtures." 1/

Rep. Rahall echoed these sentiments:

> "Quite often other materials are mixed with these large volume waste streams, with no environmentally harmful effects, and often with considerable benefit -- as when, for example, boiler cleaning acids are neutralized by being mixed with alkaline fly ash. These appear to me to be environmentally beneficial practices which

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1/ 126 Cong. Rec. H1102 (daily ed. February 20, 1980). All subsequent Congressional Record cites refer to the February 20 daily edition.

> EPA should encourage. At the very least, however, the Agency should take no steps to discourage them until it has developed a full factual understanding of the situation (126 Cong. Rec. H1104).

Mr. Rahall went on to caution EPA against unnecessary regulation of wastes that "are currently being managed in the real world, by real people, with real sense" (id).

EPA's proposal also violates congressional recycling directives. Again, the proposal discourages practices specifically advocated by Rep. Bevill during the 1980 debate:

> "[T]he amendment mandates studies that will encompass not simply waste disposal, but the potential reuses of these byproducts before they become waste materials. Reuse is important for several reasons. There no longer can be any denying of the need for us to conserve our precious natural resources. Indeed, a national commitment to encourage reuse of such materials as fly ash was a key element of RCRA . . . which, unfortunately, seems not to have received adequate attention at EPA" (126 Cong. Rec. H1102).

Rep. Staggers voiced similar concerns:

> "One of the principal adverse impacts of this overbroad regulatory program on fossil fuel combustion products would be to severely discourage their reuse. Such a result would run counter to one of the principal designs of the Resource Conservation and Recovery Act -- conservation of valuable material. The 1976 Act sought to stimulate recovery and reuse of discarded materials and thereby lessen our solid waste burden . . . . The Act is intended to encourage not discourage such beneficial reuses" (126 Cong. Rec. H1104-05).

EPA's proposal not only discourages these beneficial waste management practices, but also encourages utilization of methods Congress sought to avoid. If Kennecott is forced to abandon its waste treatment and recycling plans, the only alternative for smelter and refinery waste will be disposal in additional surface impoundments. Yet this is precisely the alternative that Congress intended to avoid in enacting comprehensive and severe restrictions on land disposal in the 1984 RCRA Amendments (see 42 USC §§ 6901(b)(6)-(8); 6902 (a)(1), (5), (6); 6294(d)).

Finally, and perhaps most importantly, EPA's reinterpretation proposal flies in the face of repeated congressional orders to avoid costly and unnecessary regulation. Rep. Bevill made this clear in introducing his amendment:

> "Mr. Chairman, this amendment would require EPA to promptly undertake studies to fill these gaps in the agency's knowledge, and to determine whether there is any health or environmental problem from the disposal of these coal by-product wastes and other materials listed on subparagraph A of the amendment. I am sure that all would agree that it would be unreasonable for EPA to impose costly and burdensome regulatory requirements without knowing if a problem really exists, and if it does, the true scope and nature of that problem" (126 Cong. Rec. H1101).

Mr. Madigan agreed:

> "[T]he time has come for the Congress to insist that agencies maximize their resources and focus on the problems that represent the greatest hazard to public welfare. EPA must exercise more common sense and should take into account the economic impact of their actions as compared to the public benefits of a particular proposed regulation or standard" (126 Cong. Rec. H1086-87).

Mr. Traxler also found these considerations paramount:

> "[I]t seems to me that the spirit behind [the Bevill] amendment is to address overzealous and perhaps unjustified regulatory action by the Environmental Protection Agency . . . .
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> "EPA has missed statutory deadlines and is now scrambling to issue final rules under pressure from a court order. The agency's motives may be generally commendable, but from my perspective it appears that EPA may be hastily classifying wastes as hazardous -- and imposing burdensome costs on businesses -- without proper or sufficient data to support their classification . . . .
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> "The agency's intentions may be good, but EPA is working under a strict timetable and seems overly eager to classify all that it can within that time frame. In the final analysis, unnecessary regulations will only add to the already high costs that industry faces from Government regulation, and this cost will ultimately be shared by the American consumer and taxpayer" (126 Cong. Rec. H1087).

Numerous similar statements appear in the 1980 debates, and Messrs. Bevill and Santini have reiterated these concerns in this proceeding. 1/

III. EPA HAS FAILED TO OVERCOME THE PRESUMPTION FAVORING THE ESTABLISHED RULE.

EPA's analysis of the legislative history would not satisfy a minimum burden of proof, but here the burden is much stronger because the agency must rebut the presumption

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1/ See 126 Cong. Rec. H1089 (Rep. Santini), 1090 (Rep. Staggers), 1103 (Rep. Rahall), 1105 (Rep. Staggers); Bevill Statement, p. 2; Santini Statement, p. 3.

in favor of its longstanding interpretation of the Bevill Amendment. In Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 42 (1983), the Supreme Court held:

> "A 'settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.' Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance" (quoting Atchison, T. & S.F. Ry. Co. v. Witchita Bd. of Trade, 412 U.S. 800, 807-08 (1973).

EPA's proposal effectively rescinds the Bevill Amendment with respect to processing waste, but the agency's rationale does not begin to satisfy the increased burden of proof resulting from its contemporaneous interpretation.

CONCLUSION

In the words of Justice Frankfurter, "This is a case for applying the canon of construction of the wag who said, 'when the legislative history is doubtful, go to the statute.'" 1/ The preponderance of the relevant legislative history supports the plain language of the Bevill Amendment indicating coverage of all smelting and refining waste. These clear expressions of congressional intent cannot be overridden by inconclusive references to a "special waste" category which EPA never implemented. EPA should withdraw its proposal to reinterpret the Bevill Amendment in favor of its longstanding interpretation which is completely in accord with the plain meaning of the statutory language.

1/ Greenwood v. United States, 350 U.S. 366, 374 (1956).

Respectfully submitted,

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